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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN GUIDA, as Trustee of the JOHN
GUIDA TRUST, et al.,

Plaintiffs, Cross-defendants, and
Appellants,

v.

JOHN SILVA et al.,

Defendants, Cross-complainants, and
Appellants.

G049849

(Super. Ct. No. 30-2012-00600551)

O P I N I O N

Appeal and cross-appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Allen Matkins Leck Gamble Mallory & Natsis, K. Erik Friess and Nicholas S. Shantar for Plaintiffs, Cross-defendants, and Appellants.

Law Offices of Frank W. Battaile, Frank W. Battaile, Miles Law Group and Stephen M. Miles for Defendants, Cross-complainants, and Appellants.

John Guida, as Trustee of the John Guida Trust, and Julie Guida, as Trustee of the Julie Guida Trust (hereafter the Guidas), bought two ocean-view lots in Corona Del Mar, both of which were developed with modest one-story 1950's era beach houses, intending to merge the lots and build a single family residence. The Guidas' lots, and a third ocean front lot, are burdened by recorded conditions and restrictions limiting structures to "one story in height" for the benefit of the two properties behind them owned by John and Alberta Silva (the Silvas) and Robin and Joan Campbell (the Campbells), each of which was developed with a two-story house with ocean views across the Guidas' lots. The Silvas' and Campbells' lots are burdened with an easement providing access from an alley to the Guidas' lots over their properties. After learning the Guidas planned on building a new house that was taller than the original structures and would impede their ocean views, the Silvas and Campbells threatened to deprive the Guidas of use of the easement. Needless to say, this action ensued.

Following a bench trial on the Guidas' complaint for quiet title and declaratory relief, and the Silvas' and the Campbells' cross-complaint¹ for declaratory and injunctive relief, the court concluded the one-story height restriction was enforceable. It entered a final judgment specifying the maximum roof height for any structure built on the front lots so as to minimize the interference with the views from the homes on the rear lots. The court also found the easement across the Silvas' and Campbells' lots was valid and enforceable. Both sides appeal. The Guidas contend the "one story in height" building limitation is unenforceable, or if enforceable, the court was too restrictive in its

¹ Although originally named in the Guidas' complaint and their own cross-complaint as individuals (i.e., John and Alberta Silva and Robin and Joan Campbell), the defendants/cross-complainants were ultimately identified and named in the judgment in relation to the trusts that owned the properties: John M. Silva, as trustee of the John M. Silva family trust dated July 19, 1989; and Peter Craig Campbell, as trustee of the Peter Craig Campbell Irrevocable Trust established July 1, 1992, by Robin A. Campbell and Joan F. Campbell. For convenience we will continue to refer to the defendants/cross-complainants as the Silvas and the Campbells.

application. The Silvas and the Campbells raise issues concerning the validity of the easement and also contend the court was too permissive in its ruling concerning the maximum roof height for structures that can be built on the Guidas' lots. We reject both sides' contentions and affirm the judgment.

I

FACTS & PROCEDURE

A. History of the Property

The five properties at issue in this action began as four individual ocean-front lots in Corona Del Mar: Lots 3 and 4, owed by the McEacherns, and Lots 5 and 6, owned by the Clelands. The four undeveloped lots were long and skinny (30 feet wide), fronting on Ocean Boulevard and extending back to an alley (known as Ocean Lane), with ocean views encompassing Lookout Point, Corona Del Mar State Beach, Catalina Island, the jetties and entrance to Newport Harbor, and the feature beyond the jetties known as the Wedge.

In May 1951, the McEacherns and the Clelands recorded the three documents affecting development of the properties, and which preceded the reconfiguration of the four lots into five. The first document was a declaration of restrictions executed on April 25, 1951, and recorded on May 7, 1951 (hereafter the Declaration of Restrictions), stating the parties "mutually desire to restrict the height of buildings which may hereafter be placed or constructed upon [the four lots]." The Declaration of Restrictions applied only to the front part of each of the four lots, omitting the rear 96 feet of each, and provided, "[t]hat any building or structure placed or constructed on said real property, or any portion thereof, shall be limited to one story in height and the roof of any such building shall have a maximum pitch of [four and one-half inches by] 12 [inches], that is to say, such roof shall have a maximum rise of [four and one-half inches] to each 12 inches of roof span." The Declaration of Restrictions stated it was made for the benefit of each lot against every other lot, would operate as a

covenant running with the land and equitable servitude, was binding on all successors and assigns of the declarants, and any breach “may be enjoined, abated or remedied by appropriate proceedings”

On the same day the McEacherns and the Clelands executed the Declaration of Restrictions, they executed two joint tenancy grant deeds, recorded on May 11, 1951. The two deeds established a “T” shaped easement for “ingress and egress, pipe lines, pole lines and other public utilities over, across and under” the rear 116 feet of Lots 4 and 5, from the alley straddling the two lots, for the benefit of all four lots (hereafter the Easement).

Thereafter, the four lots were reconfigured into five: three 40-foot wide front lots at 2808 and 2812 Ocean Boulevard (the Guida Lots), and 2818 Ocean Boulevard (the Ardis Lot); and two rear lots at 2811 Ocean Lane (the Campbell Lot) and 2821 Ocean Lane (the Silva Lot). Due to the topography, the three front lots are six to seven feet lower than the two rear lots. The Easement, which now straddled the Campbell Lot and the Silva Lot and the rear 20 feet of the middle of the Guida Lots provides access from the alley to the three front lots.

B. Development of the Lots

Successors in interest to the McEacherns and the Clelands (and predecessors in interest to the parties) *separately* built houses on the five lots. The Newport Beach City Zoning Code in effect at the time the properties were developed limited construction to two stories not exceeding 35 feet in height. The current zoning ordinance limits construction to 24 feet for a flat roof including railings; 29 feet for a sloped or pitched roof (Newport Beach Mun. Code § 20.30.060(C)(2)(a).) Neither version of the zoning ordinance defines “one story.”

The Silva Lot and the Campbell Lot were built upon first—by the Silvas’ and the Campbells’ predecessors in interest—each with a two-story house, with standard

eight-foot ceilings. The top of the Silvas' house is at 103.23 feet NAVD88.² Under the 35-foot height limit of the 1950's zoning applicable when the Silvas' house was built, it could have been as high as 111 feet NAVD88. The Campbells' house is 95.34 feet NAVD88 (a roof height of 20.84 feet above grade), and it could have been 112 feet NAVD88 under the 1950's limitations.

Subsequently, the two Guida Lots were each developed with one-story houses with standard eight-foot high ceilings. One of the houses was built on a slab with a peaked roof standing 12.74 feet tall; the other house was built over a crawlspace and had a flat roof standing 12.02 feet tall above the existing sidewalk grade of 67.3 feet NAVD88. A one-story house was eventually built on the Ardis Lot, having a peaked roof that was approximately 15-feet at the highest point—with the roof top height at 84.75 feet NAVD88.

The Guidas bought the two front lots in 2011, demolished the existing houses and obtained permission from the City to merge the two lots into a single 80-foot wide lot on which they planned to build a single one-story flat roofed house with an observation deck on top.³ The Guidas were fully aware of the one story in height building restriction in the recorded Declaration of Restrictions when they bought the lots. They proposed to build a new house that would be significantly taller than the previous houses. Perceiving the Guidas' proposal to build a house exceeding the height of the original houses would diminish their existing ocean views, the Silvas and the Campbells threatened to terminate the Easement over their properties and block access to the Guida Lots from the alley over the Easement.

² The North American Vertical Datum of 1988 (NAVD88) is the vertical control datum commonly used in surveying.

³ In our unpublished opinion *Lookout Point Alliance et al. v. City of Newport Beach et al* (June 16, 2014, G048729), we affirmed the judgment in favor of the City of Newport Beach and the Guidas rejecting a challenge to the City's approval of the lot merger.

C. Complaint/Cross-Complaint

The Guidas filed their complaint for quiet title to the Easement and declaratory relief in September 2012. They alleged the Silvas and Campbells had improperly impaired access to the Guida Lots contending the Easement was terminable at will.

The Silvas and the Campbells filed a cross-complaint against the Guidas for declaratory and injunctive relief. They alleged the one-story height limitation in the Declaration of Restrictions was intended to preserve the views from their properties of the ocean, beach, jetties, harbor entrance, and the Wedge, and was the consideration for the Easement. They alleged the Declaration of Restrictions prohibited the Guidas from building anything other than a one-story house and the structure could be no taller than the original structures. They also alleged that if the Declaration of Restrictions was unenforceable, the Easement was unenforceable.⁴

D. Trial Testimony and Evidence

The matter came on for a bench trial, during which the trial judge made a site visit agreed to by all counsel. The matter was tried with exhibits largely comprised of the operative recorded documents, a topographical study, and photographs and drawings. Each side presented expert testimony from an architect, which we summarize.

1. Testimony of Philip Kroeze

The Guidas' expert, architect Philip Kroeze, testified there was no specific height limitation for "one story" in architectural terms—it simply refers to the habitable level between two floors. The ground elevation of the Guida Lots was 73 feet NAVD88 at the back, and six to seven feet lower in the front, so about 67 feet NAVD88. The original house on the Guida Lot at 2808 Ocean Front was built over a crawl space and

⁴ The cross-complaint contained a second cause of action for trespass alleging the Guidas built a construction fence partially blocking the Silvas' and Campbells' own use of the Easement, but that cause of action was abandoned before trial.

had a flat roof at a height of 79.32 feet NAVD88, and the house at 2812 Ocean Front was built on a slab and had a peaked roof at 80.4 feet NAVD88. They both had eight-foot ceilings. Cities currently use the “average natural grade”—an average of all the property lines—in calculating height limits. The average natural grade of the Guida Lots was 70 feet NAVD88. But in the 1950’s, cities looked at the footprint of the proposed building, not the entire property, in determining the starting grade for height purposes.

The house on the Ardis Lot was built over a 3.5 foot crawl space with a peaked roof. The finished floor started at 71.03 NAVD88. The pitched roof on the Ardis house was 15.375 feet tall, at 84.75 feet NAVD88. The Ardis house has eight-foot high ceilings.

Kroeze testified the topographical survey introduced into evidence showed the ground elevation for the Silvas’ Lot was 76 feet NAVD88 and the Campbells’ Lot was 77 feet NAVD88. He testified that under the 1950’s zoning’s 35-foot height limit, the Silvas’ house could have been built as tall as 111 feet NAVD88; and the Campbells’ house to 112 feet NAVD88. The Silvas had an observation deck on the top of their house that was not done with permits.

The court questioned Kroeze about whether a reasonably marketable house could be built on the Guida Lots within the 82.5 feet NAVD88 roof height restriction the Silvas and the Campbells were advocating. Kroeze testified he could design a house at 82.5 feet NAVD88 that would comport with the “spirit” of the community, but he also testified he did not believe a reasonably marketable house could be built within that limitation. He explained with a starting elevation of 70 feet NAVD88, the 82.5 feet NAVD88 limitation meant a 12 and one-half foot tall house. New custom homes were not being built in the neighborhood at that height, but they were being built at 14 feet tall in areas like Cameo Shores. Kroeze testified a flat roof house could be designed with a 15.5 foot roof height limitation, which would include crawl space, eight-foot high ceilings, one foot to top of roof, plus railings on roof top deck. But

Kroeze would not be willing to design a house with only eight-foot ceilings; he would not want to design anything less than nine to 10 foot ceilings. Kroeze agreed taller interior ceilings could be achieved by digging down some. Kroeze agreed there were houses in the neighborhood that were built on slab at street level, but building over a three and one-half foot crawl space—raising the house up—was better for privacy and views.

Kroeze described several photographic exhibits he prepared. Exhibit 38 showed the view from the Silvas' roof top observation deck (i.e., the current roof height) and demonstrated what would happen if the Guidas built a house with a flat roof to a height of 88 feet NAVD88. He explained if the Silvas built their house taller, they could still have a view of the jetties and the Wedge. Exhibit 39 similarly showed the view from the Campbells' roof top if the Guidas built to 88 feet NAVD88—again explaining that if the Campbells went higher, their view largely remained.

2. Testimony of Brion Jeanette

Architect Brion Jeannette testified as both the Silvas' and the Campbells' expert witness and as a percipient witness. He had designed about 70 homes in the Corona Del Mar area—about 15 percent were single story. He did not consider eight-foot ceilings to be substandard for the area, but nine to 10 feet would be the average.

Jeanette had designed a house for the Guida Lots for the prior owner named Thorn, which Jeanette believed satisfied the one-story limitation of the Declaration of Restrictions. Jeanette testified he did not believe the Declaration of Restrictions was ambiguous, although things could have been “more clear.” He felt preserving the Silvas' and the Campbells' views was an important aspect of designing Thorn's house.

Jeanette designed a 6,500 square foot house for the Guida Lots with a curved or domed roof that was 14 feet tall at its highest, 84.51 feet NAVD88, a height Jeanette felt protected the Silvas' and the Campbells' views. But the house could easily have been lowered a little bit, and it would not have caused any problems. The house he designed included a 1,510 square foot basement area. Jeanette met a few times with the

Silvas and the Campbells, but they did not support the house as planned. Thorn ended up moving out of state and sold the property.

Jeanette told Thorn he felt 14 feet was a defensible height limit under the Declaration of Restrictions. Jeanette designed other houses within a 14-foot height restriction. Although the maximum height of the roof he designed for the Thorns (at 84.51 feet NAVD88) would have interfered some with the Silvas' and the Campbells' views, Jeanette specifically designed the house with a domed/curved roof to get more ceiling height for Thorn while minimizing impact on the Silvas' and the Campbells' views. The view encroachment at the maximum roof height was very small, and it equitably balanced out. Jeanette testified a flat roof house could not be built to the same maximum height without violating the Declaration of Restrictions, because a flat roof would be uniform in its affect on the view.

Jeanette testified the original house at 2808 Ocean Front had eight-foot tall ceilings and the lot's average grade was 69 feet NAVD88. Using baseline elevation from the middle of the Guida Lots at 70.3 feet NAV88, Jeanette testified a house having reasonable views could be built on a six-inch slab on the Guida Lots to a 12-foot height which would put the top of a flat roof at 81 feet NAVD88. He explained lowering the height of the house on the Guida Lots would not change the amount of ocean view from the lots; it would change the amount of sky view.

The parties stipulated to admit deposition testimony from a neighbor of the Campbells' named Jones, who had a right of first refusal to purchase the Campbells' house. If Jones acquires the property, his plans are to demolish the Campbells' house, construct a swimming pool, underground parking, and a one-story pool house.

E. Statement of Decision

The trial court signed and entered its final statement of decision on February 4, 2014. In its statement of decision, the trial court indicated it was largely relying on principles of equity and would apply the analysis set forth in *King v. Kugler*

(1961) 197 Cal.App.2d 651 (*King*), a case which held a declaration of covenants, conditions and restrictions limiting construction to a single family home “not to exceed ‘one story in height’” was not too vague, ambiguous, or uncertain to be enforced. (*Id.* at p. 655.) In accordance with *King*, the trial court stated it would consider the topography, the finished ground elevations, the general appearance of the land and the existing structures, the obvious purpose and intent of the Declaration of Restrictions to reasonably protect ocean views, and the history of the development of the properties.

After explaining the history of the subdivision of the property, the Declaration of Restrictions, and the Easement, which the court found was an integral part of the development, the trial court concluded the intent of the Declaration of Restrictions was to maximize the view from the rear lots directly over the front lots, keeping in mind there was a grade level differential of only six feet and the building height restriction on the rear lots at the time was 35 feet. The court concluded it had not been envisioned that the rear lots “would have an unobstructed view of the ocean. The [c]ourt infers that as a result of these elevations and the development of surrounding lots that some view obstruction was to be expected.” Because the Declaration of Restrictions did not set a height for a one-story building, “it was the responsibility of the purchasers of the lots now owned by the Campbells and the Silvas to build a structure as high as practicable, especially since at the time these structures were built, the front lots were still unimproved. It was expected that these structures would be two stories. On the other hand, the purchasers of the front lots had to consider that any structure they would build would by nature of the topography interfere with the view from the back lots. It was their responsibility to build a structure as low as practicable, especially if they built when the back lots were unimproved.”

The trial court observed it was undisputed the Ardis house, built after the houses on the Campbell Lot and the Silva Lot, was approximately 15 feet high at the peak of the roof from grade, oriented so the roof ridge ran along the length of the lot, and

complied with the Declaration of Restrictions. Thus, the court concluded the same or similar structures could be built on the Guida Lots, with a similar orientation (peak running length of lot), even though they would constitute a substantial view obstruction to both rear lots. The sloping roof line of a house similar to the Ardis house would still expose a portion of the ocean view the court concluded was acceptable. The court observed that after the Ardis house was built, the Silvas “addressed the obstruction to their view by installing their upper deck which provided them with the reasonable view contemplated by the developers.”

The original builder of the Campbells’ house had limited the roof height to 20.84 feet, and subsequently the owners of what are now the Guida Lots chose to build structures of 12.02 feet (flat roof) and 12.74 feet (peaked roof). “The resulting view was deemed by the Campbells’ [predecessors] to be reasonable.” In other words, the court observed the original builders on each of the lots each made independent decisions about the height of the structures that preserved the views from the Campbells’ house for over 35 years. Additionally, the view was greatly enhanced when the Guidas demolished the original structures on their lots. The Campbells had since sold a right of first refusal to their property to their neighbor, who intended to demolish the house, which could render the Campbells’ view issues moot. The trial court explained “as an equitable consideration,” that any disappointment the Campbells would now suffer if the court interpreted the one-story restriction as allowing something taller than 12.74 feet (80.4 feet NAVD88, which was the height of the taller of the old houses on the Guida Lots), was outweighed by the fact they had 35-plus years of substantial views and their house might be demolished anyway.

As to the acceptable height for a flat roof structure, the court found there was expert testimony “a reasonably marketable building or structure” could be built at a 14 foot from natural grade height, including a house with a six-inch slab foundation of approximately six inches, internal walls between 8 to 10 feet and a roof deck railing of

3.5 feet. As to a peaked roof house, the court concluded a building or structure substantially the same as the Ardis house would be acceptable provided it was oriented so that the roof ridge runs along the length of a lot or lots. The court found the street in front of the Guida Lots was at 67.3 feet NAVD88, but the houses were built at a higher than street level elevation (i.e., the lots sloped upwards six feet higher at back than front, and houses had to be set back from the street), so the court adopted 69 feet NAVD88 as the starting elevation, “which is approximately the average elevation of the front three lots rounded down to the benefit of the rear lots.” The maximum height of any flat roof building would be 83 feet NAVD88 (69 +14), and the maximum height of a peaked roof structure was set at 84 feet NAVD88 (69 + 15), provided it is oriented so the roof ridge runs the length of the lot (a peaked roof running the width of the lot would be considered a flat roof).

In accordance with its findings, the trial court stated its ruling was as follows: “The [c]ourt finds that any building or structure built on the three front lots referred to in . . . the [Declaration of Restrictions] dated May 7, 1951, shall be limited as follows: [¶] Flat roof building or structure, including without limitation, roof railings, fixtures and utilities, is limited to a NAVD88 elevation of 83 feet. [¶] Peaked roof building or structure, including without limitation, roof railings, fixtures and utilities, is limited to a NAVD88 elevation of 84 feet if such building or structure is oriented so that the roof ridge runs along the length of either lot, or a single merged lot, from [s]outhwest to [n]ortheast. Any such peaked roof shall be limited to a maximum pitch of [four and one-half] inches to 12 inches of roof span. In the event that the orientation of the building or structure is oriented so that the roof ridge does not run along the length of either lot or a merged lot, the ridge of such roof shall not exceed a NAVD88 elevation of 83 feet. [¶] The [c]ourt finds further that the easements filed concurrently with the [Declaration of Restrictions] remain in full force and effect.” The Guidas’ counsel was directed to prepare a judgment.

F. Judgment/Filing Notice of Appeal

The Guidas' counsel submitted a proposed judgment on February 18, 2014, to which the Silvas and the Campbells filed objections. On March 4, 2014, the court signed and entered a judgment tracking its statement of decision. The original judgment read in full as follows: "IT IS HEREBY ADJUDGED, ORDERED, AND DECREED, with respect to the Request for Declaratory Relief of the parties, that any future building or structure built on the three front lots at 2808, 2812[,] and 2818 Ocean Blvd., Corona Del Mar, California, referred to in the [Declaration of Restrictions] dated May 7, 1951, shall be limited as follows: [¶] A flat roof building or structure, including without limitation, roof railings, fixtures and utilities, is limited to a NAVD88 elevation of 83 feet. [¶] A peaked roof building or structure, including without limitation, roof railings, fixtures and utilities, is limited to a NAVD88 elevation of 84 feet if such building or structure is oriented so that the roof edge runs along the length of either lot, or single merged lot, from Southwest to Northeast. Any such peaked roof shall be limited to a maximum pitch of [four and one-half] inches to 12 inches of roof span, and shall be limited to a minimum pitch equal to the pitch of the roof of said structure located at 2818 Ocean Boulevard. In the event that the orientation of the building or structure is oriented so that the roof ridge does not run along the length of either lot or a merged lot, the ridge of such roof shall not exceed a NAVD88 of 83 feet. The roof of any building or structure hereafter constructed may be partially flat and partially peaked. [¶] The [c]ourt finds further that the easements filed concurrently with the [Declaration of Restrictions] shall remain in full force and effect."

There were several subsequent modifications to the judgment, each of which dated as entered March 4, 2014, the entry date of the original judgment, and most of which expressly stated they were nunc pro tunc. The first nunc pro tunc judgment has a service date of March 10, 2014. It corrected the names of the defendants (changing from the Silvas and the Campbells as individuals to identify them in their capacities as

trustees of their respective family trusts), omitted the words “roof railings” in relation to the height of a peaked roof structure, omitted the words mandating a minimum pitch equal to that on the house at 2818 (Ardis), omitted the provision that a roof could be partially flat and partially peaked, and added that the roof of a peaked roof structure could not be used for patio or viewing area.

The second nunc pro tunc judgment labeled “Judgment (nunc pro tunc)” has a service date of March 12, 2014. It is identical to the first nunc pro tunc judgment except that it adds the recording book and page number in the official records for the Declaration of Restrictions.

On March 19, 2014, the Guidas filed their notice of appeal from the March 4, 2014, judgment as modified nunc pro tunc. The Silvas and the Campbells filed their notice of cross-appeal on May 1, 2014.

A third nunc pro tunc judgment titled “First Amended Judgment (nunc pro tunc)” has a service date of May 8, 2014. It was identical to the nunc pro tunc judgment served March 12 (the second nunc pro tunc judgment), other than adding the words “First Amended” to the title.

A fourth nunc pro tunc judgment titled “Second Amended Judgment (nunc pro tunc)” also has a service date of May 8, 2014. It was identical to the second and third nunc pro tunc judgment, other than adding “Second Amended” to the title, and omitting (apparently inadvertently) the recording information.

The final version of the judgment titled “Final Judgment” has a service date of May 29, 2014. It restores the judgment to the original version, with the exception that the defendants are properly named, the recording information for the Declaration of Restrictions is included, and the sentence stating a roof could be partially flat and partially peaked is omitted. The appellants’ appendix includes almost one hundred pages of printouts of e-mail transmissions between counsel and the trial judge relating to these modifications, that were lodged by the Guidas in the trial court after the last judgment

was entered. Among them is one dated May 23, 2014, from the court clerk to counsel stating the trial judge concluded the original judgment was the one he had intended—it said what he had intended to say.

II

THE JUDGMENT ON APPEAL & CROSS-APPEAL

The Guidas contend the proper judgment on appeal is the second nunc pro tunc judgment (labeled “Judgment (nunc pro tunc)”) dated March 4, 2014, that has a service date of March 12, 2014 (hereafter to avoid further confusion this judgment will be referred to as the March 12 judgment), because their notice of appeal, and the Silvas’ and the Campbells’ notice of cross-appeal, was filed after this version of the judgment was signed. Accordingly, the Guidas argue the trial court lost jurisdiction to make any subsequent corrections to the judgment and the subsequent versions of the judgment, most particularly one labeled “Final Judgment” with the entry date of March 4, 2014, and a service date of May 29, 2014, are nullities. We reject their contention.

Absent certain exceptions not relevant here, “the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.” (Code Civ. Proc., § 916, subd. (a).) “The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.

[Citation.] Accordingly, whether a matter is ‘embraced’ in or ‘affected’ by a judgment within the meaning of [Code of Civil Procedure] section 916 depends upon whether postjudgment trial court proceedings on the particular matter would have any impact on

the ‘effectiveness’ of the appeal. If so, the proceedings are stayed; if not, the proceedings are permitted. [Citations.]” (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

Nonetheless, the trial court retains jurisdiction to “proceed upon any other matter embraced in the action and not affected by the judgment” (Code Civ. Proc., § 916, subd. (a).) This necessarily includes correction of its own records. Thus, despite the pendency of an appeal, the trial court may correct errors in a judgment nunc pro tunc, if the errors being corrected are clerical, and not judicial, in nature. (*Gravert v. DeLuse* (1970) 6 Cal.App.3d 576, 581 (*Gravert*).)

“‘A clerical error is not necessarily one made by the clerk; it may include an error made by the judge or the court. [Citation.] . . . [Citation.] The distinction between a clerical error and a judicial error . . . does not depend so much on the person making it as on whether it was the deliberate result of judicial reasoning and determination. [Citation.]’” (*Gravert, supra*, 6 Cal.App.3d at p. 581, italics omitted.)

“‘The term “clerical error” covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function.’” (*Makovsky v. Makovsky* (1958) 158 Cal.App.2d 738, 742.) “[A] court has the inherent power to correct clerical error in its records at any time so as to conform its records to the truth, but it may not amend a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. [Citation] . . . The distinction between clerical error and judicial error is whether the error was made in rendering the judgment, or in recording the judgment rendered.” (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1238.) In making this determination, the judge’s own declaration as to the nature of the error is accorded “great weight.” (*Gravert, supra*, 6 Cal.App.3d at p. 581.)

The Guidas contend the judgment labeled “Final Judgment” did not correct a clerical error, but materially altered the rights of the parties. They argue the final judgment materially differs from the March 12 judgment in that it (1) includes the

requirement that a peaked roof must have a minimum pitch, and (2) eliminates the statement that a peaked roof may not be used as a patio or viewing area. We do not see any functional difference between the two statements—both are clearly intended to prevent the Guidas from taking advantage of the higher height allowed for a peaked roof but making the peak so low that the roof could be later used as an observation deck thwarting the height restriction. Here, the trial court essentially deemed its entry of the earlier nunc pro tunc judgments (particularly the March 12 judgment that preceded the notices of appeal) a clerical error. As stated in the e-mails, which the Guidas have provided in the appellants' appendix, the verbiage of the original judgment was what the court had intended.

The Guidas also complain the final judgment fails to specify whether a structure could be built with a partially flat and partially peaked roof. Although the original judgment contained that language, the March 12 judgment (the one the Guidas contend should be considered to be the true final judgment) does not. Thus, we fail to see how the Guidas can contend its omission from the final judgment as well materially altered their rights.

Based on the foregoing, we conclude the amended judgment entry dated March 4, 2014, and served May 29, 2014, labeled "Final Judgment," was entered to correct a clerical error and did not affect the substantial rights of the parties. Accordingly, the trial court retained jurisdiction to enter that judgment, and it is the judgment we review on this appeal.

In passing, the Silvas and the Campbells suggest in their combined respondents' brief/cross-appellants' opening brief that because the notices of appeal and cross-appeal were filed before the final judgment was signed on May 29, 2014, "the appeal and the cross-appeal could—or perhaps must—be considered to be moot" and should be dismissed. The suggestion is completely unsupported by any legal analysis (see *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) [appellant

must present relevant legal authority and reasoned argument on each point made or argument may be deemed waived]), and is meritless because the notices of appeal were at worst premature, and premature notices of appeal are nonetheless effective. (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268; see Cal. Rules of Court, rule 8.104(d).)

III

THE GUIDAS' APPEAL

The Guidas' substantive arguments in their opening brief boil down to the following: (1) the "one story in height" limitation contained in the Declaration of Restrictions is too vague and uncertain to be enforced; and (2) even if the restriction is enforceable, the trial court interpreted and applied it incorrectly. We reject the Guidas' contentions.

A. Standard of Review

An appealed judgment or order is presumed to be correct, and the appellant bears the burden of overcoming that presumption. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1657.) The litigants here sought and obtained declaratory relief. An action for declaratory relief is an equitable proceeding, and the powers of a court in such an action are as broad and as extensive as in any other suit in equity. (*Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 462 (*Culbertson*).) Generally, the trial court's decision to grant or deny such relief will not be disturbed on appeal unless it is clearly shown its discretion was abused. (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 (*Dolan-King*).)

"Where, however, the essential facts are undisputed, '[i]n reviewing the propriety of the trial court's decision, we are confronted with questions of law. [Citations.] Moreover, to the extent our review of the court's declaratory judgment involves an interpretation of the [Declaration of Restrictions] provisions, that too is a

question of law we address de novo. [Citations.]’ [Citation.]” (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121.)

“As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.]” (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.) Extrinsic evidence cannot “change the patent language of the [Declaration of Restrictions].” (*White v. Dorfman* (1981) 116 Cal.App.3d 892, 899 (*White*)).) But “[t]he [Declaration of Restrictions], enacted for the mutual benefit of all . . . homeowners, are ‘to be interpreted so as to give effect to the main purpose of the contract . . . [and] where a contract is susceptible of two interpretations, the courts shall give it such a construction as will make it lawful, operative, definite, reasonable and capable of being carried into effect . . . [and] avoid an interpretation which will make [the Declaration of Restrictions] extraordinary, harsh, unjust, inequitable or which would result in absurdity.’ [Citation.]” (*Battram v. Emerald Bay Community Assn.* (1984) 157 Cal.App.3d 1184, 1189.)

“A party’s conduct occurring between execution of the contract and a dispute about the meaning of the contract’s terms may reveal what the parties understood and intended those terms to mean. For this reason, evidence of such conduct . . . is admissible to resolve ambiguities in the contract’s language. [Citation.]” (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.) “Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, *should be to effectuate the legitimate desires of the covenanting parties.*” (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444-445 (*Hannula*), italics added.) Thus, although “[i]t is a general rule that restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land[,] . . . it is also true that the “‘intent of the parties and the object of the deed or restriction should

govern, giving the instrument a just and fair interpretation.” (*White, supra*, 116 Cal.App.3d at p. 897.) With these rules in mind, we turn to the Guidas’ arguments.

B. Enforceability of the Building Height Restriction

The Guidas contend the recorded restriction that “any building or structure placed or constructed on [the Guida Lots] shall be limited to *one story in height* and the roof of any such building shall have a maximum pitch of [four and one-half inches by] 12 [inches]” is too vague and uncertain to be enforced because it lacks any numerical measure for determining what constitutes “one story in height.”

King, supra, 197 Cal.App.2d 651, upon which the trial court relied, rejected the same argument. In *King*, plaintiffs and defendants lived in homes on lots adjacent to one another in a 174-lot tract, developed by the original grantor, and their properties were subject to recorded restrictions that limited construction to “one detached single family dwelling not to exceed one story in height.” (*Id.* at p. 653.) The topography of the properties was such that defendants’ lot was lower than plaintiffs so “there was an extensive view from plaintiffs’ lot, important to the property and of immeasurable value to plaintiffs.” (*Ibid.*) When defendants commenced construction of a new structure that had “a garage floor and ceiling and, above the garage, a room with a floor and ceiling[,]” plaintiffs sought injunctive relief, contending the structure exceeded “one story in height” in violation of the deed restriction. (*Id.* at p. 654.)

While recognizing the purpose of the height restriction was to preserve views, defendants in *King*, relying on the general rule that “public policies in favor of the free use of land” require building restrictions “be certain and clear before they can be enforced,” contended the ““not to exceed one story in height”” restriction was too uncertain to support injunctive relief. (*King, supra*, 197 Cal.App.2d at pp. 653-654.) The trial court and the appellate court disagreed.

The appellate court in *King* explained that “[a]lthough the instrument does not expressly declare the intent of the grantor to preserve the view of lot owners, it is

obvious from the language used, the topography and the finished ground elevations of the tract and the general physical appearance of the land and the existing structures thereon, that *the purpose of the height restriction in the plan is to protect the lot owner's view from one elevation to another.*" (*King, supra*, 197 Cal.App.2d at pp. 654-655, italics added.) "Contrary to [defendants'] claim, *we see nothing vague, ambiguous or uncertain in the meaning of the restrictive phrase 'one story in height,' or as to what was intended thereby.* It does not appear, nor have [defendants] contended, that the words have a technical, special or peculiar meaning; they merely argue that to control the height the grantor 'should' have inserted a limit in feet and inches or other language from which the intended maximum height could have been inferred exactly. Therefore, the phrase is to be interpreted in its ordinary and popular sense rather than according to some strict legal or technical meaning. "This ordinary and popular sense is to be related to the circumstances under which the words are used, having in mind the purpose of the contract and the general situation which brought it into existence" [citation].' [Citation.] The words 'one story in height' in [the restriction] are simply and concisely used; construed in the light of the entire instrument [citation] and the general plan and appearance of existing structures established in the tract [citation], and given their plain, ordinary and popular meaning [citations], we can only conclude, as did the trial court, that a structure not to exceed 'one story in height' neither encompasses nor contemplates defendants' proposed structure" (*Id.* at p. 655, italics added.)

King, supra, 197 Cal.App.2d at page 656, determined "the popular and common usage of the phrase 'one story in height' to render the restriction sufficiently clear and certain to support injunctive relief[,]" and there was nothing "ambiguous about the term 'height.'"

King, supra, 197 Cal.App.2d 651, was cited with approval in *Seligman v. Tucker* (1970) 6 Cal.App.3d 691 (*Seligman*), a case which held a restriction prohibiting construction of structures "in such location or in such height as to unreasonably obstruct

the view from any other lot” was not too vague to be enforced. *Seligman* observed *King*’s approval of the “not to exceed one story in height” restriction “would impliedly prohibit an unreasonably high one-story structure and that this restriction would be enforceable.” (*Seligman, supra*, 6 Cal.App.3d at p. 698.) *Seligman* also discussed *Smith v. North* (1966) 244 Cal.App.2d 245 (*Smith*), a case which considered a restriction “no dwelling shall . . . contain more than one floor above the ground floor.” The plaintiffs in *Smith* had invoked this restriction to prevent defendants from constructing a split-level house that was nine feet above grade. The *Smith* court looked to the purpose of the restriction to ascertain its intent, and concluded that despite specification of an acceptable elevation, “[t]he stated as well as the obvious purpose of the covenant restricting the number of floors in dwellings on lots in the subject subdivision was to minimize their obstruction to the view.” (*Smith, supra*, 244 Cal.App.2d at p. 248.) Because defendants’ proposed construction *would not* obstruct the view from plaintiffs’ lot, the court found it conformed to the restriction. (*Id.* at p. 249.) *Seligman, supra*, 6 Cal.App.3d at page 698, observed “[t]he [*Smith*] decision, by inference, stands for the proposition that if the one-story structure had been higher and so had obstructed the view, injunctive relief by way of removal would have been proper.”

Cases from other jurisdictions have applied the reasoning of *King, supra*, 197 Cal.App.2d 651, to uphold similarly worded height restrictions. *McDonough v. W. W. Snow Const. Co., Inc.* (Vt. 1973) 306 A.2d 119, 121, considered a covenant, virtually identical to the one before us, providing any structure on defendants’ lot “will be restricted in height to one story, and shall have a roof pitch not to exceed four and one half inches in [12] inches.” The court found the restriction was not ambiguous and its application to defendants’ proposed two-story construction fulfilled the purpose of the covenant to preserve views. (*Id.* at p. 123.) (See also *Snashall v. Jewell* (Or. 1961) 363 P.2d 566, 571 [covenant forbidding construction of “more than one single story dwelling” enforceable]; *Donaldson v. White* (Or. 1972) 493 P.2d 1380, 1381 [enforcing

covenant prohibiting construction of house of more than one and one-half stories tall that had obvious purpose “to protect the view from an adjacent dominant uphill lot occupied by plaintiffs’ home”]; *Dickstein v. Williams* (Nev. 1977) 571 P.2d 1169, 1171 [nothing ambiguous in restrictive covenant limiting construction to single family dwelling “not[] exceeding one story from ground level”]; *Bauman v. Turpin* (Wash.App. 2007) 160 P.3d 1050, 1055-1057 [deed restriction limiting construction on defendants’ property to “one story” home had purpose of preserving views and was violated by construction of house that blocked plaintiffs’ views]; *Foster v. Nehis* (Wash.App. 1976) 551 P.2d 768, 770 [covenant restricting construction to “one detached single-family dwelling not to exceed [o]ne and one-half stories in height” had intent of preserving views and construction of structure that substantially obstructed plaintiffs’ views violated the restriction].)

The Guidas cite three cases from other jurisdictions finding restrictions like the one at issue here too vague and indefinite to be enforced. *Ludwig v Chautauqua Shores Improvement Assn.* (N.Y. 2004) 5 A.D.3d 1119, 1120, held a covenant that “[o]nly one single family dwelling not more than one and one-half stories in height . . . shall be placed on any lot” was ambiguous in scope, and thus required clear and convincing proof of its meaning before it could be enforced. There was no discussion or evidence in that case concerning the *intent* of the covenant, e.g., view preservation. *Hiner v. Hoffman* (Haw. 1999) 977 P.2d 878, and *Allen v. Reed* (Colo.App. 2006) 155 P.3d 443, both found similar restrictions (to “two stories” and “one story” respectively), to be ambiguous and unenforceable. Both cases simply dismissed *King, supra*, 197 Cal.App.2d 651, as unpersuasive, but neither offers any compelling reason for rejecting the prevailing authority from our own courts on the subject. And both cases relied on strict rules of construction, with no apparent attempt at effectuating the parties’ intention or the purpose of the restrictions. (See *Hannula, supra*, 34 Cal.2d at pp. 444-445 [“primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties”];

Dieckmeyer v. Redevelopment Agency of Huntington Beach (2005) 127 Cal.App.4th 248, 259 [“our duty to interpret a declaration of covenants, conditions and restrictions in a way that is both reasonable and carries out the intended purpose of the contract”].)

Accordingly, the cases the Guidas rely upon do not persuade us to reject the reasoning of *King, supra*, 197 Cal.App.2d 651.⁵

⁵ To underscore their contention the “one story in height” restriction is too ambiguous to be enforced, the Guidas point to the trial court’s revisions to the statement of decision, its multiple nunc pro tunc amendments of the judgment, and the fact the Silvas and the Campbells have also appealed from the judgment. They argue all stand as proof the restriction is incapable of reasonable interpretation. We find no merit to the point. We have already addressed the various nunc pro tunc amendments to the judgment. As for the Guidas’ assertion there were four different statements of decision, we disagree with their characterization. The record on appeal contains a three-page proposed statement of decision that is unsigned, undated, and incomplete; and objections and responses to the *proposed* statement of decision. The Guidas state there was a second proposed statement of decision issued on January 16, 2014, but the register of actions contains no such document. The Guidas refer us to several hundred pages of printouts of e-mail transmissions between counsel and the trial judge in which the document the Guidas refer to is found, along with the trial judge’s e-mail inviting counsel to comment so as to “fine tune[]” the statement of decision. The Guidas state the trial court then issued a third proposed statement of decision on January 18, 2014, citing to Tab 111 of the appellants’ appendix, which is a one-page typed document, that is unsigned and undated, but at the bottom bears the trial judge’s typed name and an invitation for further comments. The signed and filed statement of decision was entered on February 4, 2014. In sum, the record discloses nothing more than the usual process of there being a proposed statement of decision, parties’ objections and comments, ending with the trial court’s signed and filed statement of decision. We find nothing sinister or disturbing in that. And to the extent the Guidas are attempting to impeach or challenge the signed entered statement of decision or the judgment with the proposed statement of decision that effort fails. As observed in *Silverado Modjeska Recreation & Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 299, “a trial court’s tentative ruling is not binding on the court; the court’s final order supersedes the tentative ruling. [Citations.]” A trial court’s “oral [or tentative] ruling [is not] necessarily the unequivocal decision of the court. A court may change its ruling until such time as the ruling is reduced to writing and becomes the [final] order of the court. [Citation.]” (*Ibid.*; see also *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647.) The Guidas’ burden on appeal is to not demonstrate early versions of the statement of decision were correct or incorrect but to show the final judgment was legally wrong.

In light of *King, supra*, 197 Cal.App.2d 651, and cases following *King*, we simply cannot agree with the Guidas the Declaration of Restrictions is too vague or uncertain to be enforced. Here the obvious intended purpose of the Declaration of Restrictions was to protect views from the rear lots, although the Guidas dispute the extent of the views that were to be protected. As other courts have observed in assessing similar restrictions in ocean view developments, much of the value of the property depends on the quality of the view and “[t]o significantly obstruct any homeowner’s view of the Pacific Ocean is to depreciate the economic worth of their property—often by several hundred thousand dollars—as well as dramatically reduce their enjoyment of the home they bought and live in.” (*Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 623-624.)

We recognize there are some distinctions between *King* and the case before us—the Guidas largely rely on the distinction that in *King*, the grantor constructed the original dwellings, but here separate grantees built the dwellings. But we find the distinction without meaning in assessing the overall obvious intended purpose of the Declaration of Restrictions—to maintain ocean views from the rear lots. Although the original builders of the homes could have built higher under the zoning in effect in the 1950’s, they did not and the developers of the Guidas Lots did not. As the court observed the result was that in accordance with the grantors’ intentions everyone had homes with commanding views of the ocean, the jetties, the harbor entrance, and the Wedge. Having concluded the Declaration of Restrictions is not too vague to be enforceable, we turn to the Guidas’ specific complaints about how the court applied it in this case.

C. Specific Limitations Imposed by Judgment

The Guidas argue that if the Declaration of Restrictions limitation to a house “one story in height” is enforceable, then the trial court went too far in its reasoning and its judgment. They argue the court should not have specified *any* maximum height in feet that would satisfy the restriction, or alternatively if an actual

height limitation was to be imposed it should have been 17.5 feet based on the original 1950's zoning that allowed a two-story structure up to a maximum of 35 feet tall. The Guidas also contend the court should not have distinguished between the permissible height of a flat roof structure or a peaked roof structure; it should not have included in the maximum height of a flat roof structure items on top of that roof (e.g., observation deck railings, fixtures, and utilities); and should not have included a minimum pitch for a peaked roof structure or specified a peaked roof structure that was not oriented with the peak running the length of the lot would be limited to the flat roof height. And the Guidas complain the court should never have allowed considerations of marketability to enter into its interpretation/analysis of the one-story restriction (i.e., the court should not have considered the maximum height needed to build a reasonably marketable house(s) on the Guida Lots). In essence, the Guidas contend the judgment should have said only that the Guida Lots are restricted to houses "one story in height" and nothing more.

The Guidas' argument ignores this was a declaratory relief action and they no longer have any particular construction in mind by which the trial court could have assessed the restriction. At the beginning of trial, the court remarked on the "evolved circumstance[s]" that the Guidas were no longer intending to build on the Guida Lots and "what they are wanting to do is enhance the marketability" of the property. The Guidas did not contest or correct that statement, and it is confirmed by the complete absence of testimony or other evidence in the record about any current building plans of the Guidas. Subsequently, the Guidas' counsel questioned their expert, Kroeze, extensively about the roof and ceiling heights of custom homes being built in Newport Beach, and when the Silvas' and the Campbells' attorney objected on relevance grounds, counsel argued the testimony was relevant to whether a house within the height limitations proposed by the Silvas and the Campbells would be marketable. The Guidas elicited testimony from their expert that he did not believe a reasonably marketable house could be built within the 82.5 NAVD88 height limitation advocated by the Silvas and the Campbells. Having

invoked the trial court's broad equitable powers, and wanting the court to exercise those powers in what turns out to be a vacuum of any currently proposed structure, the Guidas cannot complain the trial court endeavored to do equity in this case. (*Culbertson, supra*, 225 Cal.App.2d at p. 462 [court in declaratory relief action has broad and extensive powers].)

The judgment is sufficiently supported by the evidence, and the Guidas have not shown the court's discretion was abused. (*Dolan-King, supra*, 81 Cal.App.4th at p. 974.) Here, there was extensive testimony about the maximum height to which a one-story structure could reasonably be built on the front lots without overly intruding on the ocean views of the homes on the rear lots. Additionally, the trial court's observations during its site visit was sufficient evidence to support its findings. (E.g., *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 62 ["A trial judge's view of property with the consent of counsel is evidence in the case and may be used alone or with other evidence to support the findings"]; *Orchard v. Cecil F. White Ranches, Inc.* (1950) 97 Cal.App.2d 35, 41 ["the trial court visited the premises and made a complete inspection thereof. The information obtained by him from such inspection and view of the premises is itself evidence and may be used alone or with other evidence to support the court's finding"]; *Noble v. Kertz & Sons Feed & Fuel Co.* (1945) 72 Cal.App.2d 153, 159 ["the trial judge may view the *locus in quo* for the purpose of understanding the evidence introduced; and . . . where the view is with consent, what is then seen is itself evidence and may be used alone or with other evidence to support the findings"].)

There was evidence the elevation difference from the front of the Guida Lots to the front of the Silva Lot and the Campbell Lot was about six feet. The original houses on the Guida Lots were 12.02 and 12.74 feet tall, and the Silvas' and the Campbells' houses had ocean views over those houses. The Ardis house, the last to be constructed, had a peaked roof at about 15 feet tall, and the Silvas and the Campbells have never suggested it violated the Declaration of Restrictions. Kroeze testified new

custom homes were constructed in the Cameo Shores development with a 14-foot height limitation. Jeanette testified a home could be designed at a 14-foot height restriction, he had designed such a house for the Guida Lots, and he believed it did not overly interfere with the views from the Silvas' and the Campbells' homes. Jeanette testified alternatively the average grade on the Guida Lots (based on the location of the original house) was at 69 feet NAVD88. He gave an example of a reasonably designed flat roof house that could be built on the Guida Lots with reasonable views. Assuming a starting point of 68 feet NAVD88, the house could go up to 81 feet NAVD88 with a six-inch slab and 12-foot ceilings. Ultimately, the trial court ruled acceptable height for new construction on the Guida Lots, starting at the natural grade elevation of 69 feet NAVD88 was 14 feet tall for a flat roof (83 feet NAVD88) and 15 feet for a peaked roof (84 feet NAVD88)—figures that are well within the range of reasonable heights the evidence disclosed.

Contrary to the Guidas argument, the limitations imposed by the court as to minimum pitch and orientation of a peaked roof, and the inclusion of roof top observation deck railings in height of a flat roof were not newly implied restrictions—they were reasonable evidence-based determinations of what would constitute a one-story structure consistent with the purposes and intentions of Declaration of Restrictions. As observed in *King* even without an express statement of intent, it is obvious from the language of the Declaration of Restrictions (limiting the three ocean front lots to houses one story in height but imposing no height restriction on the rear lots), and the topography of the land (rear lots about six feet higher in elevation than the front lots) “that *the purpose of the height restriction in the plan is to protect the lot owner’s view from one elevation to another.*” (*King, supra*, 197 Cal.App.2d at p. 655, italics added.) Jeanette testified a flat roof could not be built to the same height as a peaked roof because a flat roof has a uniform impact on views. A minimum pitch simply closes a potential

loophole—preventing use of an only slightly pitched roof that would have the same view impact as a flat roof—to take advantage of the higher roof maximum. Similarly, the trial court’s conclusion a peaked roof with the peak oriented across the width of the lot should be subject to the flat roof height limitation was simply an acknowledgement that such a roof would have the same uniform effect as a flat roof.

We also reject the Guidas’ argument the maximum height should be set at 17.5 feet not including a roof top deck. At trial, they argued for a maximum height of 87.5 feet NAVD88, plus another 3.5 feet for observation deck railings, i.e., 91 feet NAVD88, which based on the 69 feet NAVD88 starting elevation would mean a 22-foot tall roof—10 feet taller than the prior structures. While the Guidas understandably want to maximize the size and view potential of any house that might be built on the Guida Lots, they cannot do so at the expense of the rear lots in view of the clear unambiguous intent of the original grantors to protect the views from those lots. We are unimpressed by the Guidas’ argument the rear lots could simply build higher to reclaim any view that is lost by a potentially 22-foot high structure. At trial, the Guidas made much of the fact that in the 1950’s, the rear lots could have been built with two-story structures as high as 35 feet, but the original developers of those lots chose to build shorter two-story homes. But so did the original developers of the Guida Lots. As the trial court observed, everyone concerned built homes that preserved everyone’s commanding ocean views for the past 35 years and no one complained. The Guidas purchased their lots with full knowledge of the Declaration of Restrictions, the one-story height limitation, the size of the existing structures of the Guida Lots, the size of the structures on the Silvas’ and the Campbells’ lots, and the views from the Silvas’ and the Campbells’ houses. And the argument ignores that under *current* zoning, a two-story structure is limited to construction to 24 feet for flat roof with railings and 29 feet for a sloped or pitched roof. If the Guidas were to build to the 91 feet NAVD88 they advocate, as a practical matter

there would be no view opportunities for the rear lots and the Declaration of Restrictions would be rendered meaningless.

IV

THE SILVAS AND THE CAMPBELLS' CROSS-APPEAL

We briefly address the Silvas and the Campbells' cross-appeal. Their combined respondent's brief/cross-appellants' opening brief is confusing in that their briefed arguments fail to distinguish between their response to the issues raised in the Guidas' appeal, and the separate issues they raise in their cross-appeal. We have endeavored to tease out of their brief the points that can reasonably be construed as being in response to the Guidas' appeal and have considered them in the above analysis.

The Silvas and the Campbells' cross-appeal raises two issues concerning the Easement. They argue the Declaration of Restrictions was the sole consideration for the Easement, and therefore, if the Declaration of Restrictions is not enforceable, the Easement may be terminated. However, they also state the final judgment sufficiently preserves their views and if it stands, "the dispute as to the . . . Easement[] will be moot." Because we affirm the final judgment, we accept the Silvas and the Campbells' concession the cross-appeal as to the Easements is moot, and we decline to consider those arguments further.

In the section of their combined respondents/cross-appellants' brief designated "[summary of issues on cross appeal]," the Silvas and the Campbells state they will raise issues concerning errors the trial court made in reaching the final judgment relating to the height limitations imposed on the Guida Lots to support their assertion the court should have set the height limitation at 79.35 feet NAVD88 (a height of 12 feet above the sidewalk grade, which was the height of the original structures), rather than the 83 to 84 feet NAVD88 limitation it set. They state those issues will include: the trial court should not have considered the 1950's zoning or that the Campbells had 35 years of views across the Guida Lots; the court should not have speculated as to the Silvas'

reasons for building an observation deck or what a future purchaser of the Campbells' house might do with it (i.e., Jones's deposition testimony that if he buys the Campbell property he plans on tearing the current structure down and building a pool, one-story pool house, and underground garage); and the court should not have adopted a baseline lot elevation of 69 feet NAVD88. Although mentioned in the Silvas and the Campbells' summary of issues, the issues are not addressed anywhere in their argument—they are not analyzed and there is no discussion of relevant authorities to support them. “We will not develop the appellants' arguments for them, and therefore decline to reach the issues” (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

DISPOSITION

The judgment is affirmed. The parties shall each bear their own costs on the appeal and cross-appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.